(10)

No. 97-174

In The

Supreme Court of the United States

October Term, 1997

CASS COUNTY, MINNESOTA, et al.,

Petitioners,

vs.

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

JOINT BRIEF OF THE GRAND PORTAGE BAND OF CHIPPEWA; THE RED LAKE BAND OF CHIPPEWA; AND SISSETON-WAHPETON SIOUX TRIBE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Given that the Nelson Act is silent on the issue of tribal tax immunity, does it evidence the requisite "unmistakably clear" congressional intent to grant tax jurisdiction to county governments?

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INTEREST OF THE *AMICI CURIAE*

Amici are three federally-recognized Indian tribes. Two of the tribes, the Grand Portage Band of Chippewa and the Red Lake Band of Chippewa, are located in northern Minnesota. The third, the Sisseton-Wahpeton Sioux Tribe, is located in northeastern South Dakota and southeastern North Dakota.

All three tribes lost substantial landholdings by operation of the General Allotment Act and similar federal laws. Many parcels on Grand Portage Reservation were sold or forfeited to non-Indians under the Nelson Act – the same statute under which the Leech Lake Band lost the lands at issue in this matter.

Fortunately, the tribes have been able to re-purchase a portion of their lost homelands, and they currently hold some of those lands in fee. The tribes have been subjected to state property taxes on their re-purchased fee lands by the surrounding counties, and have thus suffered the same imposition on their tribal tax immunity as has the Leech Lake Band with respect to Cass County.

SUMMARY OF ARGUMENT

Cass County cannot identify any unmistakably clear statutory language granting it jurisdiction to impose its *ad valorem* property taxes on lands owned in fee by the Leech Lake Band within the boundaries of its reservation, which were originally sold as pine and homestead lands

under the Nelson Act.[1] The unmistakable intent rule, which is rooted in the cannons of construction applicable in Indian law, recognizes the exclusive authority of the federal government over Indian affairs. In light of the rule, the removal of restrictions on alienation under the Nelson Act and the act of selling lands to non-Indian settlers cannot be construed as a grant of state tax jurisdiction. Moreover, the exercise of state tax jurisdiction over the prior non-Indian owners of such lands did not terminate federal and tribal jurisdiction, or the Band's tax immunity.

Federal preemption is not the sole source of the tax-exempt status of reservation lands. The tax-exempt status of reservation lands is derived from treaties and the unique political status of tribes. Thus, the absence of federal control over reservation lands combined with the exercise of state jurisdiction over non-Indians within the reservation cannot alter the tax-exempt status of reservation lands. Furthermore, this Court has refused to apply a preemption analysis to determine the tax-exempt status of reservation lands. *County of Yakima v. Yakima Nation*, 502 U.S. 251, 258 (1992).

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of Court.

Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Pursuant to treaties between the Band and the federal government, all lands within the Leech Lake Reservation were separated from the tax jurisdiction of the State. There is no convincing language in the Nelson Act evidencing an intent by Congress to diminish the reservation, restore reservation lands to the public domain, or to end federal responsibility for such lands, and thereby separate these lands from the reservation. Thus, the State has never been granted exclusive tax jurisdiction over the lands in question.

The Nelson Act served a limited purpose – to permit surplus unallotted lands to be sold as pine lands or subject to entry under the homestead laws. The Nelson Act itself did not terminate tribal ownership of reservation lands. The sale of surplus unallotted lands within the Leech Lake Reservation was uncertain, and thus there was a possibility that tribal ownership would continue. Knowing that tribal ownership could continue, had Congress intended the Nelson Act to grant states exclusive tax jurisdiction over the lands in question it would have included language in the Act to that effect. Under the cannons of construction applicable in Indian law, state taxation of surplus unallotted lands was invalid before the sale of such lands, and for the same reasons cannot be permitted now that the Band has reacquired ownership of such lands.

ARGUMENT

I. IN RECOGNITION OF THE PLENARY AUTHORITY OF THE FEDERAL GOVERNMENT OVER TRIBES AND TRIBAL SOVEREIGNTY, TRIBES ARE IMMUNE FROM STATE TAXATION OF RESERVATION LANDS.

State taxation of reservation lands created by treaty and executive order cannot be justified using a preemption analysis, notwithstanding the National Association of Counties and the National Governors' Association's ("Associations") argument that preemption is the sole source of the tax-exempt status of reservation lands. Thus, the removal of a federal restriction, or the absence of federal control with respect to reservation land does not impliedly subject such land to state taxation. If this were the law, state and local governments could challenge the tax-exempt status of any reservation land on preemption grounds, whenever the federal government fails to exercise sufficient control.

Essentially, the Associations have asked the Court to apply the jurisdictional test set forth in *Williams v. Lee*, 358 U.S. 217 (1959). In that case, the Court held that state laws applied within the boundaries of an Indian reservation, unless preempted by federal law or unless such laws infringed upon tribal self-government. This Court has refused to apply the *Williams* test to determine the tax-exempt status of reservation lands, however. *County of Yakima*, 502 U.S. at 258. In the area of taxation, the Court has adopted a categorical approach: states are without jurisdiction to tax reservation lands absent congressional consent. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

Cass County fails to recognize that the tax-exempt status of reservation lands derives from treaties. *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1866). Consequently, state taxation of reservation lands is not preempted in the usual sense, i.e. by over-riding federal control or laws, because the tax-exempt status of such lands was already secured by treaty. Rather, state tax jurisdiction is said to be preempted only in the sense that state taxation of reservation lands is barred unless Congress has expressed its consent. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973). That is, until Congress explicitly grants jurisdiction to state governments to tax reservation lands, state taxation is forbidden. Congressional consent is required because the federal government has exclusive jurisdiction over reservation lands. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985).

A. The Tax-exempt Status of Reservation Lands Arises Out Of The Unique Political Status of Tribes.

Generally, Indian treaties contemplated that reservations would not be included within the territorial limits or jurisdiction of the states. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). The Court found that this implied guarantee prohibited state taxation of reservation lands. *The Kansas Indians*, 72 U.S. (5 Wall.) at 752; *The New York Indians*, 72 U.S. (5 Wall.) at 766-67. Chief Justice Marshall resolved that the federal government had completely excluded state jurisdiction over Indian reservations through the treaty-making process:

> The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with acts of Congress.

Worcester, 31 U.S. at 561. This policy of federal preemption has been modified to allow some state regulatory and adjudicatory jurisdiction over activities on reservation lands, but remains in full force with respect to the taxation of reservation lands. *Mescalero Apache Tribe*, 411 U.S. at 148 (summarizing *McClanahan*, 411 U.S. 164).

In the late 1800s, the Court found that reservation lands set aside during the treaty period were exempt from state taxation. Lands held in common, severalty, and fee were exempt from state taxation based on the unique political status of the tribes: "As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of state laws." *The Kansas Indians*, 72 U.S. at 757.

In *The New York Indians*, land was conveyed by the Seneca Nation by treaty to non-Indians (hereafter "grantees"), but the Seneca Nation was permitted to occupy the reservation for a period of five years before removal to the West. 72 U.S. at 767. The treaty provided that the Seneca Indians would hold title to the reservation in fee as joint tenants for a period of five years. *Id.* Once the Senecas were removed from the reservation, the whole title in fee was to pass to the grantees. *Id.* Under a

new treaty, however, the conveyance was cancelled, and a new deed executed between the Seneca Nation and the grantees under which it was agreed that the Seneca Nation would remain in possession of the reservation, and the grantees would retain a "right of pre-emption." *Id.* at 763. The Court held that taxation of the reservation lands was "premature and illegal," including those taxes imposed when title to reservation lands was held in fee by the grantees. *Id.* at 770. The right to occupy the reservation by the Seneca Nation, which had been guaranteed by treaty, provided the basis for the tax-exempt status of all lands within the reservation. The Court stated: "[T]he right of occupancy creates an indefeasible title to the reservation that may extend from generation to generation, and will cease only by dissolution of the tribe. . . ." *Id.* at 771.

Likewise, in *The Kansas Indians* it was the political status of the Tribe of Shawnee Indians and its right of occupancy that rendered reservation lands tax-exempt, regardless of whether reservation lands were held in severalty or in common. 72 U.S. at 755. There, the treaties with the Shawnee did not address whether division of the reservation into separate estates changed the tax-exempt status of such lands. *Id.* The Court recognized that, even in the absence of explicit treaty guarantees regarding taxation, reservation lands originally set aside by treaty would remain tax-exempt:

> If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a "people distinct from other," capable

> of making treaties, separated from the jurisdiction of Kansas, and to be governed by the government of the Union. If under the control of Congress from necessity there can be no divided authority. If they have outlived many things, they have not outlived the protection afforded by the Constitution, treaties and laws of Congress.

Id. at 755-756. The continued political existence of the Shawnees and their treaty guarantees precluded state taxation of reservation lands.

Tribes do not enjoy immunity from state real property taxes "only derivatively from federal tax immunity" as suggested by the Associations. (Associations' Brief, at 18) This Court has already held that the federal immunity-or-instrumentality doctrine no longer applies to Indians or their lands. *Mescalero Apache Tribe*, 411 U.S. at 150. Under that doctrine, the federal government was viewed as owning tribal and individual lands, so it shared its tax immunity with tribes. *See United States v. Rickert*, 188 U.S. 432, 438-39 (1902) (holding that states may not interfere with the powers vested in Congress under the Property Clause). In *Mescalero Apache Tribe*, the Court recognized that tribal tax immunity actually arises out of the unique political status of tribes, and that federal ownership of tribal lands was irrelevant. Hence, "the 'mere fact that property is used among others, by the United States as an instrument for effecting its purpose does not relieve it from state taxation.' " *Mescalero Apache Tribe*, 411 U.S. at 151, *citing Choctaw, Oklahoma & Gulf R. Co. v. Mackey*, 256 U.S. 531, 536 (1921).

That tribal tax immunity arises out of the unique political status of tribes is illustrated by a case in which the Court held that Indians of the Five Civilized Tribes lacked tribal autonomy, because there was little to distinguish them from other state citizens. *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943). Consequently, the restricted lands owned by tribal members and the proceeds derived from such lands were not assumed to be tax-exempt, and the members were required to establish that state taxes had been explicitly exempted by Congress.[2] By holding that the tribal members in that case no longer belonged to tribes having a separate political existence, the Court implied that tribes having a visible existence should and would enjoy immunity from state taxation.

For tribes maintaining a separate political existence, the tax-exempt status of reservation lands is preserved until extinguished by Congress. The tribal organization of the Leech Lake Band and its reservation was created by a series of treaties dating from 1854 and by an executive order in 1874, and has remained intact. *Leech Lake Band v. Cass County*, 108 F.3d 820, 821 (8th Cir. 1997). Therefore, Cass County must show that Congress has unmistakably granted authority to the County to tax reservation lands originally sold to non-Indians under the Nelson Act of January 14, 1889, ch. 24, 25 Stat. 642 (1989) (hereafter "Nelson Act").

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[2] Similarly, in *Goudy v. Meath*, 203 U.S. 146 (1906), an express exemption from tax was required because Goudy had severed his tribal relations and lost his inherent right as an Indian to be free from state taxation.

The tax-exempt status of reservation lands excluded from the territorial jurisdiction of the state does not extend to non-Indians. With respect to non-Indian lands, tax-exemptions may not be implied. In *Thomas v. Gay*, the Court held that the state's taxing jurisdiction was coextensive with its legislative and territorial jurisdiction. Under Oklahoma's Organic Act, the state was granted legislative power over "all rightful subjects of legislation." 169 U.S. 264, 271-272 (1889). Unlike the tribe or its members, non-Indian cattle owners were "rightful subjects" of taxation, and were thus subject to state taxation. In *Rickert*, the Court held: "All subjects over which the sovereign power of the state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation." 188 U.S. at 438.

The Nelson Act did not expressly exempt non-Indians, who were "rightful subjects" of legislative power, from state taxation. Therefore, Congress' failure to exempt non-Indian ownership of reservation lands from state taxation does not mean that Congress authorized the County to tax tribal ownership of the lands in question here.

B. Tribes Are Separated From The Tax Jurisdiction Of The State Because The Constitution Vests The Federal Government With Exclusive Authority Over Relations With Indian Tribes.

Cass County's assertion of tax jurisdiction over lands held by the Leech Lake Band within its reservation is

ultimately restrained by Article I, § 8, cl 3 of the Constitution, which grants the Federal government exclusive authority over relations with Indian tribes. *Montana v. Blackfeet*, 471 U.S. at 764. As a result, states lack jurisdiction to tax reservation lands. Only Congress has the power to modify or remove restrictions on the taxability of tribal lands. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (holding tribal sovereignty dependent and subordinate to only the federal government, not the states). In deference to the exclusive authority of the federal government over Indian affairs, the Court has never found that Congress has abdicated its exclusive authority over tribal lands in the absence of a clear expression of intent to relinquish such jurisdiction. *Montana v. Blackfeet*, 471 U.S. at 765. Thus, the Court has consistently held that "absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands . . . absent Congressional consent." *Mescalero Apache Tribe*, 411 U.S. at 148, *citing McClanahan*, 411 U.S. 164.

In a case analogous to *Leech Lake Band*, the Court held that statutes relinquishing federal jurisdiction to the states will be narrowly construed as relinquishing jurisdiction only with respect to those laws specifically identified in the statute. *Menominee Tribe v. United States*, 391 U.S. 404 (1968). There, the Court held that treaty rights to hunt and fish free from state regulation were not abrogated by a termination Act that contained no "explicit statement" demonstrating unmistakable intent to extinguish such rights.

The Menominee Termination Act of 1954, 25 U.S.C. § 899 (1954), provided that "all statutes of the United

States which affect Indians . . . shall no longer be applicable to members of the tribe." *Id.* at 412. Because the term "treaty" was not expressly mentioned as one of the federal laws no longer applicable to members of the Tribe, however, the Court declined to infer that Congress had terminated the Tribe's treaty rights. *Id.* at 412-413.

The Nelson Act should be construed in the same manner as the Menominee Termination Act. The Court cannot imply that the Leech Lake Band's tax immunity within its reservation was extinguished, absent any reference to taxation in the Nelson Act.

The tax-exempt status of reservation lands is not dependent upon whether the federal government retained or exercised exclusive jurisdiction over Indian allottees or the prior non-Indian owners of the lands at issue. What matters is that the Nelson Act did not expressly terminate the Leech Lake Band's treaty-based tax immunity with respect to lands within its reservation. The Court in *Menominee* applied the unmistakable intent rule of construction even though the statute terminated the federal trust relationship with the Tribe. Thus, the removal of federal protection and relinquishment of jurisdiction to the state did not preclude the Menominee Tribe from exercising its treaty rights free from state regulation. Similarly, the removal of restrictions on alienation under the Nelson Act should not bar the Leech Lake Band from asserting its tax immunity, derived from treaties with the Band, with respect to lands that still remain a part of its reservation.

II. THE NELSON ACT DID NOT DIMINISH THE LEECH LAKE RESERVATION OR ALTER THE TAX-EXEMPT STATUS OF RESERVATION LANDS OVER WHICH THE FEDERAL GOVERNMENT AND THE TRIBE HAVE ALWAYS RETAINED JURISDICTION.

Although Congress clearly intended to remove restrictions on alienation with respect to the lands at issue, it did not unmistakably intend to terminate all federal control and protection of such lands by passing the Nelson Act. Once a reservation is established all lands within remain a part of the reservation until Congress unequivocally removes them. *United States v. Celestine*, 215 U.S. 278, 285 (1909). The Nelson Act was a regulatory act that interfered with tribal possession, but did not diminish or disestablish the Leech Lake Reservation.[3] Because allotted and fee lands within the Leech Lake Reservation remain "Indian country", federal supremacy and tribal jurisdiction was never terminated with respect to such lands. *Seymour v. Superintendent*, 368 U.S. 351 (1962) (holding that land owned by non-Indians in fee is still "Indian country").[4]

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[3] Restraints on alienation and exclusive control over lands subject to original Indian title constitute federal regulatory action under the Indian Commerce Clause. *See* Felix S. Cohen, *Handbook of Federal Indian Law*, 514 (1982 ed.).

[4] "If the lands in question are within a continuing 'reservation,' jurisdiction is in the tribe and the Federal Government 'notwithstanding the issuance of any patent . . . .' " *DeCoteau v. Tenth Judicial District*, 420 U.S. 425, 421 n.2 (1975), *quoting* 18 U.S.C. 1151(a).

Congressional power over tribal lands is not dependent upon "either federal claims to an interest in land owned by tribes or the tenure by which the tribal land is held." *Handbook of Federal Indian Law* at 515. In *Oneida Indian Nation v. County of Oneida*, the fact that the United States never held fee title to the lands at issue "did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law." 414 U.S. 661, 670 (1974). Thus, the right of a tribe to occupy lands originally set aside by treaty must be expressly terminated and is not affected by the manner in which tribal land is held. The transfer of title and possessory rights to non-Indians under the Nelson Act does not relieve Cass County of the need to identify express congressional language in the Nelson Act that unmistakably shows the Leech Lake Band would be subject to state tax jurisdiction if it regained title and asserted its rights of occupancy to the lands originally sold under that Act.

Only if the Nelson Act had diminished or disestablished the Leech Lake Reservation, would Cass County be able to justify its assertion that the Nelson Act impliedly subjected tribal ownership of surplus unallotted lands to state taxation. The Eighth Circuit Court of Appeals and Minnesota courts, however, have consistently recognized that the Nelson Act did not diminish or disestablish reservations of the various bands of the Minnesota Chippewa Tribe. *Leech Lake Band v. Cass County*, 908 F. Supp. 689, 691 (D. Minn. 1995), *aff'd in part*, 108 F.3d 820, 821-22 (8th Cir. 1997), *citing with approval*, *Leech Lake Band v. Herbst*, 334 F. Supp. 1001, 1002 (D. Minn. 1971), and *State v. Forge*, 262 N.W.2d 341, 343-44 (Minn. 1977). The Eighth

Circuit determined that "[a]lthough the pattern of land ownership within the reservation has varied over the years, the reservation has never been disestablished or diminished." *Leech Lake Band*, 108 F.3d at 821-22.

In the most recent diminishment and disestablishment case, the Court applied a three-part test to determine whether Congress expressed its unequivocal intent to change or abolish reservation boundaries. *Hagen v. Utah*, 510 U.S. 399 (1994). The Court examined (1) "the statutory language used to open the Indian lands," (2) "the historical context surrounding the passage of the surplus land Acts," and (3) "subsequent demographics," or "who actually moved onto opened reservation lands." *Id.* at 411. This is precisely the test that was applied in *Herbst*.

In *Herbst*, the court held: (1) As in *Seymour v. Superintendent*, there is no language in the Nelson Act "vacating the reservation and restoring the land to the public domain," (2) "it is apparent in light of events before and after the passage of the Nelson Act that its purpose was not to terminate the reservation or end federal responsibility for the Indian," and (3) "[l]ess than one-fourth of the [Leech Lake] Indians actually moved off the reservation. The rest remained and many of them accepted allotments on the Leech Lake Reservation where they and their descendants continue to live." *Herbst*, 334 F. Supp. at 1004-5.

Finally, the Nelson Act does not provide for a "sum certain" payment in exchange for lands, another requirement for diminishment. *Compare DeCoteau v. District Court*, 420 U.S. at 448 (citing "gross differences" between

congressional acts that open land for settlement and agreements that "vest in the tribe at sum certain – $2.15 – per acre.").[5] The Nelson Act merely anticipated that the reservation would be opened for the purpose of selling unallotted surplus lands on behalf of the Leech Lake Band. *Herbst*, 334 F. Supp. at 1004. This Court has consistently held that such an arrangement does not diminish or disestablish reservation boundaries. *Mattz v Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. at 351.

Not only did the Nelson Act fail to diminish or disestablish the Leech Lake Reservation, but it did not terminate the Leech Lake Band's tax immunity with respect to pine and homestead lands sold to non-Indians under the Act. Congress could not have intended the removal of restrictions on alienation under the Nelson Act to apply to tribes or subject tribal ownership of lands to state taxation, because there was a possibility that such lands would never be sold. Sections 4, 5 and 6 of the Nelson Act permitted surplus lands to be sold as pine lands or subject to entry under the homestead laws. As was the case in *Mattz*, 412 U.S. 481, the sale of surplus lands within the Leech Lake Reservation was uncertain. Due to this uncertainty, the Court in *Mattz* concluded that the Tribe had not ceded all of its claim, right, title and interest in the surplus lands. *See DeCoteau*, 420 U.S. at 448.

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[5] The Nelson Act provides for an appropriation of one-hundred and fifty-thousand dollars, or *"so much thereof as may be necessary"* to fulfill the purposes of the Act. 25 Stat. 612, ch. 24, § 8. This is not a bilateral agreement providing for a sum certain per acre for each reservation.

The Nelson Act could not have subjected surplus lands to state taxation in light of the fact that tribal ownership of such lands could continue. Given that tribal ownership of surplus lands within the Leech Lake Reservation would continue unless sold, this Court cannot allow state taxation unless it finds that the Nelson Act expressly authorized state taxation of tribally-owned lands.

CONCLUSION

For the foregoing reasons, *Amici Curiae*, the Grand Portage Band of Chippewa, the Sisseton-Wahpeton Sioux Tribe, and the Red Lake Band of Chippewa respectfully request that the Court affirm the judgment of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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